IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.112 of 2006

1. Nagesh Chintaman Raut
and another ..Appellants

vs.

Padmakar Raghunath Raut ..Respondents.

Ms.Gouri Godse for appellants.
Mr.Rajiv Patil for respondent.

CORAM: S.C.DHARMADHIKARI J.
16th August, 2007

P.C.

1. This is an appeal by the defendant in Reg.Civil Suit No.129 of 1993. That suit was decreed as against them and in favour of the original plaintiffs. A decree followed restraining them not to obstruct the possession of the plaintiffs over the suit property.

2. The First Appeal carried therefrom has been dismissed by the lower Appellate Court concurring with the findings of the Trial Court.

3. The submission of Ms.Godse appearing in support of the present second appeal is that the Courts below have seriously erred in granting the decree in a suit for

simplicitor injunction. Her submission is that the plaintiffs pressed the title to the property on the basis of the sale deed dated 23rd August, 1966. She submits that it was not the absolute sale but a conditional one. That apart, according to her, when the plaintiffs were not in possession of the suit property and when the land was all through out cultivated by the appellant/defendant, then such an injuntion could not have been issued. All the more, when an amendment was sought specifically before the lower Appellate Court to the written statement by incorporating the plea of adverse possession. No order has been passed on that application for amendment in favour of the appellants but the lower Appellate Court proceeded to reject the same maintaining the decree. This itself raises a substantial question of law. In substance, her grievance is that when the plaintiff does not seek any declaration of his title but sue for injunction simplicitor to protect his possession and when he is not found to be in possession, then, his suit cannot be decreed, whatever may be the other finding in his favour.

4. I am unable to agree with Ms.Godse for more than one reason. In the present case, the suit was filed by the respondent/original plaintiff for protecting his

possession which was traceable to the sale deed executed in their favour by the deceased Chintaman Raut. According to the plaintiff, there is a specific recital in the sale deed that possession was handed over by deceased Chintaman to him. Thus, he is the owner and in possession of the property since the date of purchase. His possession was not disturbed from the date of sale deed till the year 1991 but an attempt was made to disturb it and that is how the suit had to be filed.

5. The appellants' case was that Chintaman had taken some hand loan from the plaintiff and for securing the same, a document was executed in favour of the plaintiff in 1966. They never handed over possession. The specific case was that after execution of the document in 1966 Chintaman continued to draw income from the land and more particularly from the mango trees during his life time. He repaid the handloan with interest amounting to Rs.6000/- to the wife of the plaintiff. Thus, this is not a case of outright sale but of mortgage. Such being the case, the sale deed does not bind them.

6. It is this case which is tested by the Trial Court. The Trial Court has noticed the undisputed position with regard to the sale deed in para 13 of its judgment so also

with regard to possession. It has been specifically observed that the sale deed having been executed, the name of the plaintiff has been entered as owner on the basis of the sale deed. All this was never objected to by Chintaman or the present defendants/appellants. All rights of Chintaman in the land were clearly transferred. As against this, by mere plucking of mango trees and relying upon some receipts, it cannot be said that the defendants are in possession or atleast lawful possession. In other words, possession of the deceased Chintaman and that the present appellants was held to be on behalf of the plaintiff. Reliance was placed upon letters (Exh.50, 51 and Exh. 39) where the claim of ownership and possession stands admitted. Even the land revenue has been paid by the plaintiff.

7. These findings are confirmed by the lower Appellate Court. It is in such circumstances that I am unable to accede to the submissions of Ms.Godse that the plaintiff was not in possession of the suit property and, therefore, could not have claimed any injunction. The pleas raised by the appellants in the written statement were tested on the basis of the oral and documentary evidence. The oral and documentary evidence pointed towards the title as also possession of the plaintiff. Mere cultivation done by

Chintaman on behalf of the plaintiff is not enough to reject the claim is the conclusion. There is no error in granting relief which was prayed for by the respondent/plaintiff. This is not a case where the amendment setting up a claim for adverse possession being granted, that the appellants could have succeeded. Once, they could not prove that the document was not a sale deed but a mortgage, so also, their possession being of the nature explained hereinabove, there is no question of allowing them to set up a plea of adverse possession and even if the same was allowed to be set up, the same could not have been granted.

8. There is no merit in the second appeal which deserves to be dismissed and is dismissed accordingly.

(S.C.DHARMADHIKARI J.)